CHEONG WING CHOW & ANOR.

v.

R & A TRADING (KL) SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
LIM BENG CHOON J
[ORIGINATING SUMMONS NO. S7-24-269-90]
21 JUNE 1990

LAND LAW: *Priorities - Oral versus written sale and purchase agreement - Joint owners - Lack of consent of joint owner to oral transaction - Equity - System of registration - Registrable interest - Application for removal of caveat not made by registered proprietors but by purchasers under written contract - Purchaser not registered property in their name - National Land Code 1965, s. 323.*

The subject of this property (the said property), was jointly owned by Mr. and Mrs. W who sold the property to the plaintiffs P for RM260,000. Upon execution of the sale and purchase agreement (the S & P), P paid Mr. and Mrs. W 10% as deposit; the S & P was stamped on 29 December 1989. When P lodged a private caveat over the said property on 30 December 1989, (as the property was charged to OUB), they discovered that the defendant company, R & A, had on 29 December 1989 entered a caveat on the said property. P argues that R & A had wrongfully caveated the property and applied for an order of removal of R & A's caveat on the basis that P, as *bona fide* purchasers for value, had no notice of R & A's interest in the land and that the purported oral S & P entered into by R & A and W was a nullity since Mrs. W had not consented to the sale of the said property.

R & A alleged that on 22 December 1989, the director of R & A, Y, had agreed to purchase the said property for RM320,000 and that Y had given W a company cheque for RM3000 as part payment; W acknowledged receipt by signing a letter of undertaking and payment voucher. W had at all times advised Y that Mrs. W had given him, W, the authority to act for her in the sale of the said property. Y requested that the oral terms of this agreement be recorded and to this end, various appointments were made for W to attend Y's solicitors Messrs GCC; however these terms were never recorded. As a result R & A lodged a caveat on the said property and filed an action for specific performance of the oral agreement made on 22 December 1989.

Mrs. W, in her affidavit, said she did not authorise W to sell the said property; Mr. W says he had told R & A that he would need the consent of his wife. The issues for determination were:

(a) whether R & A was qualified to enter the private caveat within the terms of s. 323 of the National Land Code (NLC) and

(b) if the answer is yes, whether the subsequent interest of P could override the earlier right of R & A.

Held:

[1] The *Macon Engineers Sdn. Bhd.* case firmly establishes the rule that the purchaser under a contract for the sale and purchase of land is a person claiming a right to a registrable interest in the land. To protect such a claim, he has the right under s. 323(1)(a) of the NLC to enter a private caveat.

[2] Bearing in mind the principles laid down in the *Macon Engineers* case and *Letchumanan's* case;

(a) Since the application to remove the caveat was not commenced by the registered proprietors but by P who claims to have a right under the sale and purchase agreement executed by them, it is for P to satisfy the Court that there are sufficient grounds in fact and law for treating them as persons claiming such an interest in the land which if it were established, make them aggrieved by the evidence of the caveat.

(b) P not being parties to the said oral agreement are clearly not in a position to know the true circumstances in which the dispute arose between the defendant company and the two registered proprietors.

(c) The fact that the two registered proprietors had sworn affidavits saying that the wife co-proprietor had never consented to the sale of the said property cannot, at this summary stage, be ground for holding that the defendant company is precluded from claiming for specific performance of the oral agreement of 22 December 1989; the defendant company, through their director had said in the affidavit of 17 March 1990 (enclosure 5) that the defendant company had brought an action against the two registered proprietors for specific performance of the oral agreement of 22 December 1989.

[3] As P have not yet registered the transfer of the said property in their names, the Court cannot at this stage of the proceeding decide on the conflicting equities of the two parties; it should be decided at the trial of this action when further evidence would no doubt be adduced by the two parties. In any event at this stage *prima facie* the defendant company's equity appears to be earlier in time to that of the plaintiffs.

[Plaintiff's application dismissed.]

Cases referred to:
Macon Engineers Sdn. Bhd. v. Goh Hooi Yin [1976] 2 MLJ 53
Eng Mee Yong & Ors. v. Letchumanan [1979] 2 MLJ 212

Legislation referred to:
National Land Code 1965, ss. 323

Other sources referred to:
Snell's Principles of Equity 27th Edn., p. 45

For the Plaintiff - K. Kirubakaran; M/s. Chan & Kiru
For the Defendant - P.M. Mahalingam; M/s. P.M. Mahalingam & Co.

JUDGMENT

Lim Beng Choon J:

On 20 February 1990 the two plaintiffs applied to this Court by originating summons for an order to remove the private caveat entered by the defendant company *vide* Presentation No. 12434/89 Jilid No. 117 Folio N. 192 presented on 29 December 1989 over the land held under title C.T. No. 10945, Lot No. 119, s. 53 Bandar Kuala Lumpur (hereinafter referred to as "the said property").

The grounds relied by the plaintiffs to have the caveat removed as can be seen from the affidavit of Cheong Wing Chow, the 1st plaintiff, are these. The said property was jointly owned by one Wong Kwai Fong and his wife Choong Siew Chow. By a sale and purchase agreement executed on 27 December 1989 the two owners of the said property sold the

property to the plaintiffs at the purchase price of RM260,000. Upon the execution of the said agreement the plaintiffs paid the owners the sum of RM26,000 as deposit and part payment of the purchase price. The sale and purchase agreement was duly stamped on 29 December 1989. The plaintiffs also took the precaution of requesting their solicitors to carry out a search in the relevant Land Office to see whether the said property was encumbered. As a result of the search made on 28 December 1989 they were informed that the said property was only encumbered by a charge registered by the Overseas Union Bank Ltd. To protect their interest, the two plaintiffs also caused a private caveat to be entered over the said property on 30 December 1989. Upon caveating the said property it was discovered that the defendant company had on 29 December 1989 entered the caveat mentioned earlier against the said property. The plaintiffs alleged that the defendant company had not acquired any caveatable interest over the said property because:

(a) When the plaintiffs agreed with the two owners to purchase the said property, it was not encumbered save and except for a charge registered by Overseas Union Bank Ltd.

(b) In the defendant company's application for entering their private caveat, they said that they had agreed to purchase the said property for the sum of RM320,000. In support of their claim the defendant company had exhibited a letter purportedly signed by Wong Kwai Fong a co-owner of the said property. The said letter was not signed by Choong Siew Choo the other co-owner.

(c) The defendant company knew or ought to have known that the said property was jointly owned by the two persons and therefore they should have dealt with both the owners instead of dealing solely with Wong Kwai Fong.

(d) The payment voucher referred to in the defendant company's application to enter the private caveat also showed that the purported payment was made only to Wong Kwai Fong instead of to the two co-owners.

For the above reasons the plaintiffs therefore asserted that the defendant company had wrongfully caveated the said property. The private caveat entered by the defendant company should therefore be removed particularly when the plaintiffs as *bona fide* purchasers for value had no notice of the defendant company's interest in the land and that caveat had prevented the plaintiffs from completing the sale of the said property.

One Yong Chao Foo, the director of the defendant company affirmed an affidavit in reply (encl. 5) on 17 March 1990. From what I can gather from Yong's affidavit, the said property was supposed to be sold by public auction on 4 January 1990. The defendant company was keen to buy the said property as it was on an adjoining lot of a shoplot known as No. 22, Jalan Sungei Besi, Kuala Lumpur. The shoplot was registered in the name of Kosei Sdn. Bhd. and the defendant company owned 90% of the shares of Kosei Sdn. Bhd. In buying the said property the defendant company intended to develop the said property and the shoplot into one single shoplot. Yong was introduced to Wong Huai Fong the co-owner of the said property by the vendor of the shoplot. On 11 December 1989 at about 5 p.m. Wong Kwai Fong went to Yong's office and offered to sell the said property to the defendant company for RM350,000. After some negotiation Yong, after discussing the matter with the co-director of the defendant company, counter offered with the purchase price of RM290,000 for the property on behalf of the defendant company. On 12 December 1989, Wong Kwai Fong called on Yong again to discuss about the sale of the property. In fact he called on Yong quite a few times to negotiate about the purchase price of the said property. Finally on 22 December 1989 he met Yong and the co-director of the defendant company and told them that he and his wife, who had given him authority to act for her in the sale of the said property, were prepared to accept the sum RM320,000 as the purchase price. Yong and the

co-director accepted the offer on behalf of the defendant company. Wong Kwai Fong then asked for the sum of RM3,000 as part payment of the purchase price. Thereupon Yong handed him the company cheque for a sum of RM3,000 as part payment. Wong Kwai Fong thereafter acknowledged receipt by signing an undertaking letter and payment voucher. When asked whether his wife as co-owner should also sign the letter and voucher, Wong Kwai Fong said that it was not necessary because she had authorised him to sell the said property on her behalf. For the benefit of the shareholders of the defendant company Yong wanted the terms of the oral agreement to purchase the said property made on 22 December 1989 to be recorded. He therefore arranged with Wong Kwai Fong to go to his solicitors' firm M/s George Chew, Chandra and Associates on 26 December 1989 to do the needful. Accordingly on that day Yong and Wong Kwai Fong met at the office of the solicitors' firm. They saw one Miss Emily Ng a conveyancing clerk of the said firm and informed her of the terms of the oral agreement made between them on 22 December 1989. Apparently they were told to come back to the solicitors' office the next day to sign the record of the terms of the oral agreement. On 27 December 1989 Yong and the co-director went to the solicitors' office at about 1.45 p.m. to sign the recorded terms. They were informed by Emily Ng that she had received a call from Mrs. Wong Kwai Fong saying that she and her husband would call at the said office to sign the recorded terms. However later Yong received another call from Mrs. Wong Kwai Fong who apologised to him for not being able to attend at the said office but promised to call at the said office on 28 December 1989 at 11 a.m. Again on that day at about 9.30 a.m. Yong and his co-director went to the solicitor's office and waited until 12.30 p.m. but Mr. and Mrs. Wong Kwai Fong never turned up. Under the circumstances Yong and his co-director instructed their solicitors to enter a caveat over the property. The defendant company had also filed an action against Wong Kwai Fong and Chong Siew Choo, the registered owners of the said property for specific performance of the oral agreement made on 22 December 1989.

To substantiate the version given by Yong, the defendant company also requested Miss Emily Ng Soo Chun (Emily Ng) to file an affidavit and she did so on 21 March 1990. In her affidavit (encl. 58) she gave her version of what took place. The two directors of the defendant company and Wong Kwai Fong did call at the solicitors' office on 26 December 1989 with a view to see Mr. George Chew a partner of the law firm. As Mr. George Chew was on leave and would only return on 27 December 1989, Yong and Wong Kwai Fong then informed her of the oral agreement made on 22 December 1989 between Mr. and Mrs. Wong Kwai Fong and the defendant company, in respect of the sale of the said property. They gave her all the relevant particulars pertaining to the said property and the agreed terms relating to the sale transaction. Upon seeing the title deed, Emily Ng observed that Chong Siew Choo was a co-owner of the said property. She therefore queried Wong Kwai Fong who told her that the co-owner was his wife and that she had authorised him to sell the said property on her behalf. Emily Ng then asked for the number of his wife's identity card. Wong Kwai Fong then telephoned his wife and got the number of her identity card and gave it to Emily Ng. Wong Kwai Fong also told Emily Ng that his wife was aware that the cheque for RM3000 which was given by the defendant company to him was for the part payment of the purchase price of the said property. Emily Ng then told Yong and Wong Kwai Fong to call at the office on the next day at 2 p.m. to sign the record of the terms of the oral agreement made on 22 December 1989. Emily Ng substantiated what Yong said in his affidavit about the events that took place on 27 and 28 December 1989. As Mr. and Mrs. Wong Kwai Fong failed to turn up to sign the recorded terms of the agreement made on 22 December 1989 George Chew on the instructions of Yong and his co-director thereupon directed Emily Ng to file the caveat which was duly done on 29 December 1989.

The plaintiffs also called both the registered co-owners to put in their affidavits to substantiate that no agreement was ever made with the defendant company to sell the said property to them. Choong Siew Choo, the wife co-owner, in her affidavit affirmed on 22 March 1990 (encl. 3) averred that she did not authorise her husband, Wong Kwai Fong, to sell the said property; neither had she indicated to the defendant company or their solicitors that her husband had authority to sell the said property on her behalf. She, however, admitted that she did speak to a clerk of the solicitors firm representing the defendant company on 27 December 1989 but only to tell the said clerk that she had not agreed to sell the said property to the defendant company. Wong Kwai Fong, the husband co-owner, in his affidavit affirmed on 22 March 1990 (encl. 8) admitted that he had discussed with the defendant company regarding the possible sale of the said property and this was done without the knowledge of the plaintiffs who became aware of the matter after they found out about the caveat entered by the defendant company on 29 December 1987. In his negotiating with the defendant company on the selling price of the said property he did indicate to them that he would need to seek the consent of his wife who was the co-owner. The cheque and voucher referred to in the affidavit of Yong (encl. 5) were prepared in the defendant company's office and issued in his name. His wife was never a party to the transaction at the material time. He accepted the cheque for RM3,000 on the express condition that the sale of the said property would be subject to his wife's approval and consent. As his wife had not given her consent he wrote a letter to the defendant company to refund the RM3000 to them; the cheque for that amount was sent together with his letter. The defendant company, however, refused to accept the letter and the cheque. The said letter and the cheque together with the envelope were annexed to his affidavit as Exhibit 'WKF1'. Choong Siew Choo and Wong Kwai Fong each filed another affidavit in which they denied the assertions made by Emily Ng.

Yong Chau Foo, the director of the defendant company put in a further affidavit affirmed on 26 March 1990 in which he reiterated that Wong Kwai Fong had at all material time informed him, his co-director and Emily Ng that his wife had authorised him to sell the said property. He also said that the denials made by the two co-owners in their respective affidavits were all lies. Yong also produced a letter dated 14 December 1984 written by Overseas Union Bank addressed to Syarikat Stereo House No. 20 Jalan Sungei Besi Kuala Lumpur which Yong said was owned by and belonged to the two co-owners of the said property. That letter indicated *inter alia* that the said property was put up for auction at a reserved price of RM260,000. The bank would only review the interest rate from receipt of the full redemption sum of RM260,000. The owners of the said property was required to repay the monthly installment of RM3000 towards settlement of the outstanding debt. The bank also said that they would call off the public auction sale upon receipt of the 10% deposit of RM26,000.

Turning to the case law for guidance I would first refer to the case of *Macon Engineers Sdn. Bhd. v. Goh Hooi Yin* [1976] 2 MLJ 53 (the case was cited by the Counsel for the plaintiffs). In that case the respondent agreed to purchase certain property from the vendors for the sum of RM175,000 and paid a deposit of RM17,500 towards the purchase price. The date of completion was 6 November 1973. On that date the vendors' solicitors wrote to the respondents' solicitors to give notice that the balance purchase price was to be paid by that day and to say that unless they received the money immediately the deposit would be forfeited. On 23 November 1973 the respondent's solicitors wrote to the vendors' solicitors pointing out that the vendors were not the registered proprietors of the property and stating that they were prepared to complete the purchase if the vendors could show proof that they were the registered proprietors failing which the respondent would rescind the contract and

sue for damages. On 27 November 1973 the vendors' solicitors wrote to the respondent's solicitors to state that no question of rescission of the agreement could arise as the agreement had been determined and the deposit forfeited. In December 1973 the respondent attempted to register a caveat to protect his right and interest under the agreement but he did not succeed in doing so until 21 November 1974. The application of the appellants for the removal of the caveat lodged by the respondent was made on the grounds that they had agreed to purchase the said property from the vendors for a sum of RM195,000 by an agreement dated 15 June 1974 and that on full payment by them of the agreed purchase price the vendors had executed in their favour a legal transfer of the said property which could not be registered because of the respondent's caveat. At the hearing of the appeal before the Federal Court Counsel for the appellants posed two questions to the Court. The first question was whether the respondent was qualified to enter the private caveat within the terms of s. 323 of the National Land Code. If the answer to that question was in the negative then the caveat must be removed. If the answer was in the affirmative then the second question was whether the subsequent interest of the appellants could override the earlier right of the respondent. In answer to the first question Gill CJ (Malaya) held that although the respondent could not claim title to or any registrable interest in the property merely on the strength of the sale agreement which was a non-statutory and non-registrable instrument, it could not be denied that he had a right under that agreement to such title or interest by bringing an action for specific performance which in fact he had already done. In the circumstances therefore the learned Judge was of the opinion that the respondent was qualified to enter the caveat pursuant to the said s. 323. In answer to the second question the learned Judge said at p. 55 of the reported case:

> Coming now to the second question as to whether the subsequent interest of the appellants overrides the earlier right of the respondent. The basis rule at law, as in equity, is that estates and interests primarily rank in the order of creation. *Qui prior est tempore potior est jure*: he who is earlier in time is stronger in law. (see *Snell's Principles of Equity* 27th Edn. p. 45). Where there is a system of registration of titles to land the one who succeeds in the scramble to get on the register emerges victorious. In the present case the respondent did get on to the register earlier. I do not think it is open to us at this stage to decide on the conflicting equities of the two parties. That again is a matter which will have to be decided by the Court when the respondent's action comes up for trial. *Prima facie*, the respondent's equity is earlier in time to that of the appellants. It will therefore not be right for the caveat to be removed pending the result of the respondent's action.

The second appeal Judge Ali FJ in answer to the first question expressed his view more lucidly when he said at p. 56:

> In the case of a vendor who refuses to execute such a transfer the purchaser will have to sue him for specific performance which, if granted, would result in the vendor being compelled by the Court to execute the transfer. While waiting for specific performance the purchaser must be able to do something to prevent the vendor from disposing of the land to another buyer or purchaser. He may ask the Court for an injunction or he may avail himself of the protection given by the National Land Code. The latter, I think, is comparatively an easier way of protecting his right or interest. If he enters a caveat that is enough evidence to show that he is "claiming a registrable interest in land."

In answer to the second question Ali FJ said at p. 57:

> The question of priority was raised in the Court below by Counsel for the respondent. Counsel for the appellants had submitted that it was not relevant but the learned Judge, apparently agreeing with the former, has held that the respondent has a prior equity. That would mean that the respondent has the right to be registered as the owner of the land. Quite

clearly the stage has not been reached when this can be pronounced by the Court. Both the appellants and the respondent have to establish that they have equities or equitable rights in respect of the land under the respective agreements. Until the question of equities is determined I cannot see how the question of priority of equity can arise for consideration in the present proceedings. I therefore disagree with the finding that the respondent has a prior equity. This, however, is only of academic importance. It cannot have any effect on this appeal.

Ali FJ also dealt with two other grounds raised by the appellants in which they said that the 1973 agreement having been terminated by the vendors the respondent was not entitled to claim specific performance. The learned Judge in considering the two grounds said at p. 56:

Whether or not the agreement has been rightly terminated is clearly an issue between the respondent as purchaser and Weng Lye Development company as vendors under the agreement. The appellants not being parties to the agreement are clearly not in a position to know the true circumstances in which the dispute arose between the company and the respondent. The fact that the managing director of the company had sworn an affidavit saying that the agreement has been terminated cannot be a ground for holding that the respondent is not entitled to claim specific performance. For the reasons stated I would reject grounds (5) and (6).

The *Macon Engineers Sdn. Bhd.* case therefore firmly establishes the rule that the purchaser under a contract for the sale and purchase of land is a person claiming a right to a registrable interest in the land. To protect such a claim, he has the right under s. 323(1)(a) of the National Land Code to enter a private caveat.

The second case I would like to refer is *Eng Mee Yong & Ors. v. Letchumanan* [1979] 2 MLJ 212. In that case Lord Diplock laid down some useful propositions. His Lordship firstly explained the scope of a caveat under the Torrens system in this way (see p. 214):

The caveat under the Torrens system has often been likened to a statutory injunction of an interlocutory nature restraining the caveatee from dealing with the land pending the determination by the Court of the caveator's claim to title to the land, in an ordinary action brought by the caveator against the caveatee for the purpose. Their Lordships accept this as an apt analogy with its corollary that caveats are available, in appropriate cases, for the interim protection of rights to title to land or registrable interest in land that are alleged by the caveator but not yet proved.

Secondly Lord Diplock dealt with the question of whether it is for the caveator to satisfy the Court that the caveat should remain. In dealing with this question His Lordship said at p. 215:

In their Lordships' view a distinction is the registered proprietor of the land (*i.e.* the caveatee) and cases where the applicant is some other person who claims a right to an interest in it. In the former case the caveatee can rely upon his registered title as *prima facie* evidence of his unfettered right to deal with the land as he pleases; it is for the caveator to satisfy the Court that there are sufficient grounds in fact and law for continuing in force a caveat which prevents him from doing so.

His Lordship went on to say in the same page:

It is otherwise when the applicant under s. 327 is someone other than the caveatee. He has no registered title to rely upon as *prima facie* evidence of his interest in the land. It is for him to begin by satisfying the Court that there are sufficient grounds in fact and law for treating him as a person claiming such an interest in the land as would, if it were established, make him aggrieved by the existence of the caveat.

Thirdly, Lord Diplock considered the nature of the onus that rested with the caveator to satisfy the Court that the application for removal of the caveat should not be allowed. On this point His Lordship said at p. 215:

> Their Lordships have already noted the analogy between the effect of a caveat and that of an interlocutory injunction obtained by the plaintiff in an action for specific performance of a contract for the sale of land restraining the vendor in whom the legal title is vested from entering into any disposition of the land pending the trial of the action. The Court's power to grant an interlocutory injunction in such an action is discretionary. It may be granted in all cases in which it appears to the Court to be just and convenient to do so. Similarly in s. 327 it is provided that "the Court ... may make such order on the application as it may think just." The guiding principle in granting an interlocutory injunction is the balance of convenience; there is no requirement that before an interlocutory injunction is granted the plaintiff should satisfy the Court that there is a "probability", "a *prima facie* case" or a "strong *prima facie* case" that if the action goes to trial he will succeed; but before any question of balance of convenience can arise the party seeking the injunction must satisfy the Court that his claim is neither frivolous nor vexatious; in other words that the evidence before the Court discloses that there is a serious question to be tried.

Bearing in mind the principles laid down in the two cases mentioned above, I shall now proceed to deal with the case before me. The first question that I should take note of is that the application to remove the private caveat entered by the defendant company was not made by the registered proprietors of the said property but by the two plaintiffs who claim to have a right under the sale and purchase agreement executed between them and the two registered proprietors of the said property. It is for them "to begin by satisfying the Court that there are sufficient grounds in fact and law for treating (them) as (persons) claiming such an interest in the land as would, if it were established make (them) aggrieved by the evidence of the caveat." (see *Eng Mee Yong* case). The second point that I should take note of is that from my scrutiny of the submission of the Counsel for the plaintiffs the grounds relied by them to revoke the caveat are two-fold; firstly it is their contention that the purported oral sale and purchase agreement entered into by the defendant company and Wong Kwai Fong On 22 December 1989 is a nullity since the registered co-proprietor Choong Siew Choo had never consented to the sale of the said property and secondly the plaintiffs purchased the said property for valuable consideration without any knowledge at all of the earlier sale and purchase agreement until after they had entered a private caveat on 30 December 1989. By the second ground the plaintiffs seem to suggest that even if the oral agreement of 22 December were valid, the plaintiffs' equitable right and interest in the said property must be superior to the defendant company's right and interest in the said property.

In my consideration of the first ground, there are no doubt conflicting evidence as regards to whether the registered co-proprietor namely the wife Choong Siew Choo did authorise her husband to act on her behalf in selling the said property to the defendant company. On the one hand, the plaintiffs said that there was no valid agreement since the wife Choong Siew Choo had never consented to the sale and they were able to obtain the two affidavits from the two registered co-proprietors of the property to support the fact. On the other hand the defendant company through their director asserted that the sale was made by Wong Kwai Fong, one of the registered proprietors, armed with authority to act on behalf of his wife, the other registered proprietor. In, addition to that they got the conveyancing clerk of M/s George Chew, Chandra and Associates, who dealt with the recording of the terms of the oral sale and purchase agreement of 22 December 1989, to file an affidavit confirming that the wife co-owner had positively agreed to the sale of the said property to the defendant company. Faced with such dispute of fact I should not attempt to resolve the conflict of evidence on affidavits on this issue. The matter can only be resolved when the case goes on trial. Furthermore whether or not the oral sale and purchase agreement of 22 December 1989 is valid or not is clearly an issue between the defendant company and the 2 registered proprietors of the said property. The plaintiffs not being parties to the said agreement are clearly not in a position to know the true circumstances in which the dispute arose between

the defendant company and the two registered proprietors. The fact that the two registered proprietors had sworn affidavits saying that the wife co-proprietor had never consented to the sale of the said property cannot, at this summary stage, be ground for holding that the defendant company is precluded from claiming for specific performance of the oral agreement of 22 December 1989 which in fact the defendant company through their director had said in the affidavit of 17 March 1990 (encl. 5) that the defendant company had brought an action against the two registered proprietors for specific performance of the oral agreement of 22 December 1989. In any case if the two registered proprietors of the said property were positive that no valid agreement was entered into on 22 December 1980 why would they not apply to have the private caveat removed instead of leaving it to the plaintiffs to do so? After all the said property belonged to them and they should be more concerned to have the caveat removed so that they could deal with their own land freely.

With regard to the second ground relied by the plaintiffs namely that they had no knowledge of the purported transaction between the two registered proprietors of the said property and the defendant company and therefore their equity is superior to that of the defendant company, the plaintiffs have not yet registered the transfer of the said property in their names. That being the case I do not think it is open to me at this stage of the proceeding to decide on the conflicting equities of the two parties; it should be decided at the trial of this action when further evidence would no doubt be adduced by the two parties. In any event at this stage *prima facie* the defendant Company's equity appears to be earlier in time to that of the plaintiffs.

To complete this judgment I should also mention that at one stage I felt that it was incredible that the two co-proprietors would side the plaintiffs considering that the plaintiffs only offered the purchase price of the said property in the sum of RM260,000 when the defendant company were willing to pay them RM320,000 a difference of RM60,000 which is a sizeable difference. The inference that could possibly be drawn from this is that the oral agreement of 22 December 1989 could very well be invalid as the wife registered proprietor had never consented to the sale. Upon a careful scrutiny of the affidavit evidence I am of the view that that is not the only inference that I could draw. The answer to the issue lies in the letter of the Overseas Union Bank of 14 December 1989 by which the said bank said they would call off the auction if the two registered proprietors would first of all pay the monthly installment of RM3,000 and thereafter pay a deposit of RM26,000. As the plaintiffs had paid him the sum of RM26,000 to stop the auction while the defendant company paid him only RM3,000 presumably to settle the monthly installment of which Wong Kwai Fong willingly accepted, it is not inherently incredible that the two registered proprietors felt that they were bound to complete the contract with the plaintiffs otherwise they might well be sued by them considering that they had entered into a written agreement with them while their agreement with the defendant company was only an oral one. It will therefore be premature for me to draw any inference at this stage. I can only draw a proper inference after all necessary evidence is adduced at the trial of the case.

In the ultimate analysis I am of the view that basing on the affidavit evidence before me the defendant company have disclosed that there are more than one serious questions to be tried. Their claim is neither frivolous nor vexatious. For these reasons the application of the plaintiffs to have the private caveat entered by the defendant company under Presentation No. 12434/89 Jilid No. 117 Folio No. 192 over the land in question is dismissed with costs.

Also found at [1991] 1 CLJ 507